No. 46017-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

COMCAST CABLE CORPORATION

Appellant

v.

CORTNEY R. BLACK

Respondent

BRIEF OF APPELLANT

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A. Assignments of Error at the Superior Court

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2. Finding of Fact No. 8 insofar as it states that the preponderance of the evidence supports the compensability of Mr. Black's right shoulder condition diagnosed as a labral tear that arose naturally and proximately out of his work activities with Comcast Cable Corporation.

3. Conclusion of Law No. 2 to the extent that Mr. Black's right shoulder condition is an occupational disease within the meaning of RCW 51.08.140.

4. Conclusion of Law No. 3 to the extent that it reverses the Department of Labor and Industries Orders of October 19, 2010 and September 14, 2011, and insofar as it reverses Industrial Appeals Judge Stewart's September 19, 2012 Proposed Decision and Order and the Board's affirming order of November 9, 2012.

II. APPELLANT'S STATEMENT OF THE ISSUES

1. Whether the Superior Court committed error by reversing the prior four fact finders well-reasoned decisions by

adjudicating that Mr. Black's alleged right shoulder condition was a compensable occupational disease under RCW 51.08.140.

2. Whether the Superior Court's findings of fact and conclusions of law are supported by substantial evidence.

III. APPELLANT'S STATEMENT OF THE CASE

Claimant, Mr. Cortney Black, was a six-year employee of Appellant, Comcast Cable Corp ("Comcast"). Claimant was hired as an installation communication technician. Clerk's Papers (hereinafter CP) at 106. He began at Comcast as a Tech I and rose to the position of Tech IV. *Id.* Claimant admitted experiencing no specific injury to his right shoulder. CP at 24, 26, 28, 113, and 170. Instead, he claimed his right shoulder pain came on spontaneously sometime in May 2010. *Id.* He initially sought treatment at a walk-in clinic, but was referred to orthopedist John Hung, MD. CP at 114. Dr. Hung saw claimant on just two occasions. CP at 224. At their first visit, Dr. Hung performed a standard orthopedic evaluation that he believed was suggestive of a labral tear. CP at 208. Accordingly, he ordered

an MRI scan of the right shoulder to confirm that diagnosis. CP at 213.

Claimant underwent a right shoulder MRI scan that was interpreted by radiology specialist Jorge Medina, MD as being an entirely normal study, i.e., showing no tears of any kind. CP at 173-174, 214, and 248-250. Later, Dr. Hung expressed his disagreement with the reading radiologist and stated he believed the MRI scan clearly demonstrated a "significant labral tear" that he thought (based on the worker's history) was caused by claimant's overhead work activities at Comcast. CP at 214. Because of the glaring difference in views, the employer opted for a second opinion from longtime orthopedic surgeon, Colm O'Riordin, MD. Dr. O'Riordin performed the identical orthopedic provocative tests as Dr. Hung, but unlike Dr. Hung determined them all to be normal, i.e., finding no objective evidence supporting the presence of a labral tear or any other abnormal shoulder pathology. CP at 186-190. Dr. O'Riordin personally evaluated the MRI scan and concurred with the reading radiologist that it demonstrated a completely normal right shoulder

and exhibited no evidence suggestive of a significant labral tear. CP at 173-174.

Claimant also saw orthopedic surgeon, Stewart Kerr, MD, at the employer's behest whose examination, findings, and conclusions were identical to those of Dr. O'Riordin. CP at 228-230. Although Dr. Kerr did not provide any live testimony in this case, his report, findings, and conclusions were evaluated by Dr. Hung and acknowledged during his deposition. *Id.*

Under direct examination, claimant's supervisor, Mr. Scott Craig, provided the most accurate description of claimant's job duties at Comcast. CP at 139-142. Mr. Craig testified under cross-examination that he accompanied claimant in the field at least once a week. CP at 143-144. Mr. Craig took exception to one critical portion of claimant's sworn portrayal of his work duties, specifically with his having to pull cable overhead. CP at 140-141. Mr. Craig testified that he could not "think of any overhead lifting [claimant] would be doing." CP at 141. That is significant because claimant's lone medical expert (Dr. Hung) relied upon that specific activity as the

cause of the significant labral tear he alone was diagnosing. CP at 219.

The Department of Labor and Industries denied this claim as an occupational disease on October 19, 2010. CP at 48. Following claimant's subsequent request for reconsideration, the Department of Labor and Industries reexamined the case for a second time and affirmed the prior denial order on September 14, 2011. CP at 50. Claimant appealed that decision to the Board of Industrial Insurance Appeals ("Board"). Following a full hearing and presentation of evidence, Industrial Appeals Judge Craig Stewart issued a Proposed Decision and Order on September 19, 2012 that affirmed the department's denial. CP at 42-46. Judge Stewart's well-reasoned opinion accurately and succinctly encapsulates all the evidence presented. *Id.* Claimant submitted a petition for review to the Board of Industrial Insurance Appeals appealing Judge Stewart's decision. Claimant's petition was reviewed and denied by the Board via an Order issued on November 9, 2012. CP at 6.

Claimant appealed the November 9, 2012 decision to Pierce County Superior Court Judge Vicki L. Hogan who with little to no

explanation reversed the four prior fact finder's decisions and instructed counsel for both parties to draft the Stipulated Judgment Summary confirming her decision, which was done and is the subject of this appeal. CP at 293-297 and RP at 3-15 (Verbatim Trans. of Proceedings).

IV. STANDARD OF REVIEW

Judicial review of matters arising under the Industrial Insurance Act is governed by RCW 51.52.110 and RCW 51.52.115. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 849, 117 P.3d 365 (2005). Appeals from the Board of Industrial Insurance Appeals decisions to the superior and appellate courts are based solely on the record developed before the Board. RCW 51.52.115, *Rector v. Dept. of Labor and Indus.*, 61 Wn. App. 385, 810 P.2d 1363, *rev denied* 117 Wn.2d 1004, 815 P.2d 266 (1991). The scope of this court's review on workers' compensation appeals is the same as in other civil matters; that is, the court generally reviews for errors of law and substantial evidence. *Groff v. Dept. of Labor and Indus.*, 65 Wn.2d 35, 41, 395 P.2d 633 (1964).

As the appealing party before Superior Court, claimant had the burden to prove by a preponderance of evidence that the Board's findings were incorrect. RCW 51.52.110, *Frazier v. Dept. of Indus.*, 101 Wn. App. 411, 3 P.3d 221 (2000). The Board's findings are presumed correct. RCW 51.52.100. The findings and decision of the Board are considered prima facie correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Dep't of Labor & Indus. v. Moser*, 35 Wash. App. 204, 208, 665 P.2d 926 (1983). On review, the superior court reviews the record de novo and can substitute its own findings and decision for the Board's only if it finds, from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This court reviews questions of law, including statutory construction, de novo. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wash.2d 504, 507, 833 P.2d 381 (1992). The court construes statutory language according to its plain and ordinary meaning. *Flanigan v. Dept. of Labor and Indus.*, 123 Wash.2n 418, 423-24, 869 P.2d 14 (1994). We (the Appellate Court) review the superior court's decision under the

ordinary standard of review for civil cases. RCW 51.52.140. We review whether substantial evidence supports the Superior court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Wenatchee Sportsmen Assn v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572 , 574, 70 P.3d 125 (2003).

V. ARGUMENT FOR REVERSAL

A. The Superior Court Erred In Concluding That Mr. Black Established An Occupational Disease Under RCW 51.08.140. As A Result, The Superior Court's Decision Does Not Flow From The Findings And Therefore Is Not Supported By Substantial Evidence.

RCW 51.08.140 defines an occupational disease as follows:

> "Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective provisions of this title.

Two elements are necessary to prove an occupational disease: 1) the disease arose naturally out of employment; and 2) the disease arose proximately out of employment. In order to establish that a disease arose naturally out of employment, distinctive work conditions must more probably than not have caused the disease or disease-based disability than conditions in everyday life or all employment in general. *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). In order to establish that the disease arose proximately out of employment, the worker must show that conditions of employment proximately caused or aggravated his condition. *Simpson Logging Co. v. Dept. of Labor & Indus.*, 32 Wn.2d 472, 479, 202 P.2d 448 (1949); *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 339, 777 P.2d 568 (1989). More importantly, both prongs are predicated on the fact that claimant has a recognizable and established disease, which the preponderance of medical evidence

fails to establish here as determined by all four fact finders below the Superior Court.

1. **Claimant's lone expert's conclusions are not supported by facts.**

Superior Court relied solely upon the medical testimony of orthopedist John Hung, MD and his two examinations of claimant to establish an occupational disease. RP 3-15. For claimant to prove causation, the testimony of medical experts "must establish that it is more probable than not that the occupational disease exists and was proximately caused by his employment conditions." *Grimes v. Lakeside Indus.*, 78 Wash. App. 554, 897 P.2d 431 (1995). Dr. Hung's opinion failed to meet this standard and was properly discounted by the Department of Labor and Industries and by the Board of Industrial Insurance Appeals for the following reasons:

First, Dr. Hung is a new orthopedist having only been Board Certified for two years prior to his examination of claimant in 2010. CP at 206.

Second, Dr. Hung found no objective medical evidence positively confirming any right shoulder diagnosis. CP at 226. Dr.

Hung admitted that both his examinations of claimant demonstrated he had full right shoulder ranges of motion, full strength, and no atrophy, which per Dr. Colm O'Riordin (employer's testifying expert, see *infra*) is nearly impossible if claimant indeed had a significant labral tear. CP at 172-173, 209, and 233.

Third, Dr. Hung confirmed that all four x-rays taken of claimant's right shoulder were interpreted by the reading radiologist as being entirely normal, i.e., demonstrating no objective evidence supporting the existence of a tear of any kind, which he concurred with following his own personal review of them. CP at 212 and 226.

Fourth, claimant points towards Dr. Hung's administration of provocative tests as supporting his occupational disease claim. However, Dr. Hung openly admitted provocative tests are purely subjective and rely strictly on the patient's forthrightness. CP at 226. As a result, Dr. Hung, by his own admission admitted these subjective tests do not objectively support the existence of any disease process, but can warrant further testing such as an MRI scan, as he ordered in this case. CP at 213. In fact, the Neer's and Hawkins tests he performed and claimed were positive by his own admission are

designed to assess a shoulder impingement of some kind (and not a tear) and are "almost nine times out of ten . . . typically positive. but I wouldn't say it's, you know, definitive . . ." CP at 210-211. More importantly, Dr. Hung acknowledged reading the reports from two other more experienced and long-time orthopedic surgeons than himself (Drs. Stewart Kerr and Colm O'Riordin) who had examined claimant and had administered those very same provocative tests and declared them all negative. CP at 228-231.

Fifth, based on claimant's reaction to the subjective assessments, Dr. Hung ordered an additional test, a right shoulder MRI scan with contrast with a radiologist of his own choosing (Dr. Jorge Medina) because he believed it to be the best tool available to view a "significant labral pathology." CP at 213 and 228. The Board record is abundantly clear that Dr. Hung is the only physician out of four to see an abnormality on that MRI scan. CP at 229-231. In addition, Dr. Hung openly admitted having no formal training or education specific to reading MRI scans. CP at 206-207.

Dr. Hung acknowledged his choice of radiologist (Dr. Jorge Medina) interpreted that right shoulder MRI scan as being entirely

normal i.e., showing no tears or any other abnormalities. CP at 214. Dr. Hung also admitted receiving and reviewing reports from two other orthopedic surgeons (Drs. Stewart Kerr and Colm O'Riordin) who examined claimant and personally reviewed the MRI scan, both concurring with Dr. Medina that it was an entirely normal study that displayed no objective evidence of a significant labral tear or of any other abnormality. CP at 229-231.

In fact, during Dr. Hung's deposition, he identified several specific frames of the MRI scan that he believed showed the alleged "significant labral pathology" (i.e., a tear), which were admitted without objection as exhibits. CP at 215-217. Dr. Hung's transcribed deposition along with the admitted exhibits were then shared with the MRI reading radiologist, Jorge Medina, MD, prior to his sworn deposition. CP at 249. Dr. Medina confirmed his personal re-review of the entire MRI scan just prior to his deposition giving extra attention to the specific frames identified by Dr. Hung during his deposition. CP at 248-250 and 254-255. Once again, Dr. Medina opined that it was a completely normal study. CP at 248 and 250. Specifically, he testified that there was absolutely no objective

evidence supporting the presence of a "significant labral tear" or of any other abnormal pathology of any kind in the frames identified by Dr. Hung or in any of the remaining frames. CP at 248-250.

Finally, Dr. Hung opined that the labral tear he alone believed existed "was *probably* caused by claimant's work." (Emphasis added). CP at 220. When pressed, Dr. Hung testified that labral tears are caused when doing activities "above the shoulder level or if they happen to catch certain objects in unpredictable situations that could lead to falls or issues when they've fallen and they've caught themselves." CP at 219. There is no evidence in the record establishing claimant experienced any fall or had to perform any work above his shoulder/head, which is the crux of Dr. Hung's opinion. CP at 141.

As a result, Dr. Hung's opinion should be disregarded just as the Department of Labor and Industries and the Board have done, which thereby results in claimant's occupational disease claim failing.

2. **Employer's expert's opinions are more well-reasoned and should be relied upon as the four fact finders below the Superior Court had.**

The employer had long time orthopedic surgeon, Dr. Colm O'Riordin, examine claimant on August 4, 2010. CP at 169. Dr. O'Riordin has been a Board Certified orthopedic surgeon since 1978 and has extensive experience with shoulders and shoulder surgeries. CP at 167. Claimant arrived at his examination with his wife and small children. CP at 170.

Dr. O'Riordin performed a thorough examination of claimant after reviewing all the medical records and films generated in this case. CP at 169. Dr. O'Riordin acknowledged that he was presented with a comprehensive understanding of claimant's work duties. CP at 193-195. Dr. O'Riordin opined that following his examination of claimant and review of all the records, x-rays, and MRI film that he found no objective medical evidence supporting any diagnoses or disease process, essentially believing it was a normal examination. CP at 172. Dr. O'Riordin also opined there were no objective findings supporting any diagnoses or disease in either of Dr. Hung's two examination records. *Id.*

When Dr. O'Riordin was asked what objective findings he would expect to see if claimant indeed had a significant labral tear as

Dr. Hung was diagnosing, Dr. O'Riordin testified that he would "expect to see atrophy of the muscles about the shoulder girdle. I would expect to see a reduced range of motion. I would expect to see difficulty in performing external and internal rotation and abduction of the shoulder, and none of these findings were present in this case." CP at 172-173 and 196-199.

Dr. O'Riordin testified that he performed the very same provocative tests on claimant that Dr. Hung did and reported they were all negative, i.e., were deemed normal. CP at 186.

Finally, Dr. O'Riordin personally evaluated the right shoulder MRI scan and concurred with Dr. Medina that it was an entirely normal study that demonstrated no evidence of a significant labral tear or of any other abnormality. CP at 173. In support of that opinion, Dr. O'Riordin explained that the dye used before undergoing the MRI scan was all contained within the structure of the shoulder, meaning "there was no evidence of any changes in either the labrum or to his shoulder itself or the rotator cuff." CP at 173-174. When asked to a degree of reasonable medical certainty if claimant suffered

any industrial condition or disease to his right shoulder, he replied "No, he did not." CP at 174.

Dr. Jorge Medina has been a Board Certified Radiologist since 2001 following an extensive education, chief residency at Mount Sinai Medical Center in Miami, Florida, and fellowship all specializing solely in radiology. CP at 245-246. Dr. Medina interprets approximately 65-100 films a week in his current position, 40 of which are typically MRIs. *Id.*

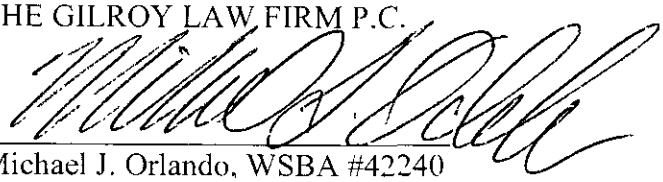
As previously documented, Dr. Medina personally reviewed claimant's MRI scan on two occasions, the first immediately after its completion, and again just before his deposition. CP at 248-250. As noted, Dr. Medina has consistently interpreted the MRI scan to be entirely normal. Specifically, that it demonstrated "no tears of the rotator cuff, no labral tears, [or] abnormality of the muscle." CP at 248 and 250. Dr. Medina maintained that opinion following his re-evaluation of the specific frames of the MRI that Dr. Hung relied upon to form his diagnosis. CP at 248-250 and 254-255.

VI. CONCLUSION

For the foregoing reasons, Comcast Cable respectfully urges this Court to reverse the decision of the Pierce County Superior Court and reinstate the judgment of the four prior fact finders below (the Superior Court) that denied claimant's occupational disease claim because the preponderance of the medical and testimonial evidence fails to establish claimant suffering from any occupational disease involving his right shoulder.

DATED this 19th day of September, 2014.

THE GILROY LAW FIRM P.C.



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CERTIFICATE OF MAILING

I hereby certify that I served a true and correct copy of BRIEF OF APPELLANT on the following individuals:

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on the 19th day of September, 2014 by mailing to said individuals a copy thereof, contained in a sealed envelope, with postage prepaid, addressed to said individuals at the addresses above stated, and deposited in the United States Post Office in Lake Oswego, Oregon on said date.

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